(18,603.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 83.

W. H. SPENCER, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES V. BENNETT AND SAMUEL W. ROTHROCK, PARTNERS AS BENNETT AND ROTHROCK, PLAINTIFF IN ERROR,

vs.

DUPLAN SILK COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 April Sessions, 1901.

Trespass.

R. E. Wright
T. M. B. Hicks

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York. } 6.

Frank Jacobs
Wm. J. Turner

1901, March 19.—Exemplification of record from the court of common pleas, Lehigh county, Penna., filed.
1901, March 19.—Wm. J. Turner, Esq., appears for defendant.
1901, April 23.—Plea filed.
1901, May 6.—R. E. Wright, Esq., and T. M. B. Hicks, Esq., appear for plaintiff.
1901, May 7.—Replication filed.
1901, Nov. 11.—And now to wit a jury being called come to wit (see Minutes).
And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty three 00-100 dollars.
Plaintiff's bill of costs filed.
Motion for judgment *non obstante veredicto* filed.
1902, January 15.—Opinion, McPherson, J., refusing defendant's motion for judgment *non obstante veredicto* filed.
1902, January 18.—Præcipe for judgment filed. Judgment accordingly.
1902, January 24.—Bill of exceptions sealed and filed.
1902, January 24.—Assignments of error filed.
Petition for writ of error allowed and filed.
Writ of error exit and copy thereof lodged in clerk's office for adverse party.
Citation allowed and issued.
Bond sur writ of error approved and filed.
1902, January 27.—Citation returned service accepted.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you between W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, pl'ff, and Duplan Silk Company, def't, a manifest error hath happened, to the great damage of the said Duplan Silk Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the third circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 24th day of January, in the year of our Lord one thousand nine hundred and two.

SAMUEL BELL,

[SEAL.] *Clerk of the Circuit Court of the United States.*

Allowed by—
THE COURT.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to
3 be holden at the city of Philadelphia within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, eastern district of Pennsylvania, wherein Duplan Silk Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John B. McPherson, judge, holding circuit court of the United States this 24th day of January, in the year of our Lord one thousand nine hundred and two.

JOHN B. McPHERSON, *J.*

Service accepted.
T. M. B. HICKS,
Att'ys for Def't in —.

Exemplifications.

STATE OF PENNSYLVANIA, } ss:
Lehigh County, }

[Seal.] Among the records and proceedings of the court of common pleas for the county of Lehigh, State of Pennsylvania, the following may be found as matter of file and of record, at No. 42, November term, 1900, to wit:

Continuance.

Docket Entries.

November Term, 1900.

E. Wright

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York. } 42.

-nk Jacobs

Summons in trespass. Returnable to next term. Exit Oct. 18, 1900.

Served on E. J. Lipps, att'y and ag't for def't Oct. 29, 1900.

Oct. 18, 1900.—Statement of plaintiff's demand filed.

And now, November 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead with ten days of judgment. Nov.
4 13, 1900, service accepted. Nov. 19, 1900, petition for removal of case to circuit court filed. Nov. 19, 1900, bond of Duplan Silk Company as principal and Wm. Jay Turner as surety in the sum of five hundred dollars, approved by the court, filed. Now, Nov. 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiff to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred dollars ($500) with William J. Turner, as surety, be approved. And that all proceed-

ings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable 3d Monday of December next. Nov. 22, 1900, service accepted. Now, December 19, 1900, a rule having been granted on November 19, 1900, on the plaintiff in the above case to show cause why the record of said case should not be removed to the circuit court of the United States for the eastern district of Pennsylvania and the bond — above named defendant in the sum of five hundred dollars with William J. Turner as surety be approved, and said rule having been served on Robert E. Wright, counsel of record for said plaintiff, returnable the 3d Monday of December, 1900, upon due consideration it is ordered that said rule be made absolute, and that all proceedings in the above-stated case of the said court of common pleas of Lehigh county be stayed. That the record of the said case be removed to the United — circuit court for the eastern district of Pennsylvania, and that the bond of the said defendant in the sum of five hundred dollars with William J. Turner as surety conditioned that he will enter a copy of said record in said case in the said circuit court of the United States on the first day of its next session, and that it will well and truly pay all costs which may be awarded by said circuit court of said court shall hold that said suit was wrongfully or improperly *be* removed thereto, and shall cause to be done *and* such other proper acts as by the act of Congress approved March 3, 1875, and other acts of Congress are required to be done on the premises be approved.

In the Court of Common Pleas of Lehigh County, Nov. Term, 1900.

W. H. SPENCER, Trustee, etc.,
vs.
DUPLAN SILK COMPANY. } No. —.

5 To John F. Stine, prothonotary:

Issue summons in trespass as above stated returnable for the next term.

R. E. WRIGHT,
Attorney for Plaintiffs.

Endorsed: 42. Nov. T., 1900. W. H. Spencer, *et al.*, *vs.* Duplan Silk Co. Præcipe for summons filed Oct. 18, 1900.

LEHIGH COUNTY, *ss.*

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

We command you that you summon Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, so that it be and appear before our court of common

pleas, to be holden at the city of Allentown, in and for said county, on the second Monday of November next, then and there to answer W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, in an action of trespass in the court of common pleas aforesaid, at the suit of the said W. H. Spencer, trustee in bankruptcy, etc., *et al.*

And have you then and there this writ.

Witness the Honorable Edwin Albright, president of the said court, at the city of Allentown, the eighteenth day of October, in the year of our Lord one thousand nine hundred (1900).

JOHN F. STEIN,
Prothonotary,
Per WM. H. SNYDER, *Deputy.*

Endorsed: 42. Nov. term, 1900. W. H. Spencer, trustee, etc., *et al.*, *vs.* Duplan Silk Company. Summons. R. E. Wright, att'y. Sheriff W. B., $3.15.

In the Court of Common Pleas of Lehigh County, —— Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York.
} No. —.

6 *Statement of the Plaintiff's Demand.*

The plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, seeks in this action to recover from the defendant, Duplan Silk Company, a corporation organized and existing under the laws of the State of New York, the sum of twelve thousand (12,000) dollars damages, which is justly due and payable by the said defendant to the said plaintiff, upon the cause of action whereof the following is a statement:

That on the 13th day of January, A. D. 1900, under and by virtue of the provisions of the act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, were adjudged by the district court of the United States for the western district of Pennsylvania to be bankrupts. That on the 27th day of January, A. D. 1900, W. H. Spencer, the plaintiff, was duly appointed the trustee in bankruptcy of the estate of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock,

and duly qualified as such trustee, and has from that time continued to act and is now acting duly as such trustee.

That on or about the 15th day of January, A. D. 1900, the said Duplan Silk Company, the defendant, at Hazleton, in the State of Pennsylvania, wrongfully and illegally took and converted to its own use certain chattels of great value, to wit, of the value of twelve thousand (12.000) dollars, which were then and there the property of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, or of their bankrupt estate. That the said chattels were on the said 13th day of January, 1900, the property of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, and that by reason of the adjudging of the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, to be bankrupts by the said district court of the United States for the western district of Pennsylvania on the said 13th day of January, 1900, the said chattels became the property of the bankrupt estate of the said bankrupts, and the title in and to the said chattels passed to and vested in W. H. Spencer, the plaintiff, the trustee in bankruptcy of the said estate of the said bankrupts, immediately upon his appointment and qualification as such trustee, as of the date of the adjudging of the said bankrupts to be bankrupt, to wit, as of the 13th day of January, 1900. That the following is a list and description of the said chattels, to wit:

7 *Yellow Pine Timber.*

103 pieces, 8 x 10 x 16	
18 pieces, 8 x 10 x 24	
23 pieces, 8 x 10 x 22	
34 pieces, 8 x 10 x 20	
13 pieces, 8 x 8 x 24	
23 pieces, 8 x 8 x 22	
19 pieces, 8 x 8 x 20	
123 pieces, 6 x 8 x 11	
78 pieces, 6 x 8 x 9	
15 pieces, 10 x 16 x 24	
14 pieces, 9 x 14 x 16	
8 pieces, 12 x 14 x 16	
11 pieces, 3 x 8 x 12	
80 pieces, 6 x 8 x 16	
19 pieces, 3 x 15 x 16	51,914 feet
5/4 yellow pine stepping	1,000 feet
4/4 yellow pine stepping	635 feet
Maple flooring	14,002 feet
3" spruce flooring	15,840 feet
Slip tongue	86,120 feet
13 turned posts, 13 ft. long	
24 turned posts, 14 ft. long	
12 turned posts, 12 ft. long	

24 turned posts, 17 ft. long
4 pieces, 4 x 8 x 24
545 pieces, 4 x 10 x 16
49 pieces, 4 x 10 x 18
9 pieces, 4 x 10 x 20
2 pieces, 4 x 10 x 22
5 pieces, 3 x 15 x 16
21 pieces, 3 x 12 x 18
12 pieces, 3 x 8 x 22
2 pieces, 3 x 8 x 12
1 piece, 4 x 6 x 16
7 pieces, 4 x 6 x 20
2 pieces, 4 x 6 x 24
2 pieces, 3 x 6 x 20
2 pieces, 6 x 6 x 14
9 pieces, 8 x 8 x 20
11 pieces, 8 x 8 x 21
3 pieces, 6 x 8 x 9
26 pieces, 6 x 8 x 11
21 pieces, 6 x 8 x 16
12 pieces, 8 x 10 x 20
1 piece, 8 x 10 x 18
8
158 pieces, 8 x 10 x 16
9 pieces, 8 x 10 x 22
2 pieces, 6 x 14 x 10
3 pieces, 6 x 14 x 16
2 pieces, 6 x 14 x 14..... 49,168 feet

Yellow Pine Timber.

9 pieces, 3 x 14 x 16
91 pieces, 3 x 4 x 14
2 pieces, 3 x 4 x 12
20 pieces, 10 x 16 x 16
17 pieces, 10 x 16 x 18
12 pieces, 10 x 16 x 20
11 pieces, 10 x 16 x 22
3 pieces, 10 x 16 x 24
8 pieces, 12 x 16 x 14 ..... 18,980 feet

Hemlock Timber and Plank.

Grooved two edges.

318 pieces, 2 x 12 x 14
350 pieces, 2 x 12 x 16
604 pieces, 2 x 10 x 16
1927 pieces, 2 x 8 x 12
96 pieces, 2 x 8 x 14
250 pieces, 2 x 8 x 16..... 75,318 feet

Tongued and grooved.

132 pieces, 2 x 12 x 14
73 pieces, 2 x 12 x 16
138 pieces, 2 x 12 x 18
4 pieces, 2 x 10 x 12
161 pieces, 2 x 10 x 14
827 pieces, 2 x 10 x 16
1665 pieces, 2 x 8 x 14
295 pieces, 2 x 8 x 16
31 pieces, 2 x 8 x 18
117 pieces, 2 x 6 x 14..... 77,324 feet
884 pieces, 1 x 10 x 16
356 pieces, 1 x 10 x 14..... 16,292 feet
47 pieces, 3 x 6 x 14
831 pieces, 3 x 6 x 16
8 pieces, 2 x 4 x 16
16 pieces, 2 x 4 x 14..... 21,063 feet
Roofing lath..... 26,856 feet

9 *Iron Work.*

52 caps for wood posts.
9 caps for wood posts.
65 base plates for wood posts.
1 double column, 1815 pounds.
22 wall plates, 32 pounds each.
2 sliding door tracks.
89 tie straps.
26 shelf brackets, 4 pounds each.
72 truss bolts.
144 truss bolts.
1 manhole door and frame.
8 square fenders.
2 round fenders.
6 anchor bolts and plates.
170 $\frac{3}{8}$″ x 3$\frac{1}{2}$″ lagscrews.
42 kegs 8d. cut nails.
30 kegs 10d. cut nails.
80 kegs 40d. cut nails.
78 kegs 8d. wire nails.
5 kegs 60d. wire nails.
3 bbls. Portland cement
206,000 hard brick.
2 tons mortar color.
3 x 12 spruce flooring, 18,912 feet.
1 car terra cotta wall coping.
1 car eye beams.
1 coal stove.
4 guy lines.

2 hand ropes.
2 slings.
3 double wood blocks.
3 single wood blocks.
1 double iron block.
1 single iron block.
1 grindstone.
18 canal barrows.
6 mortar hoes.
6 long handled shovels.
6 short handled shovels.
12 buckets.
100 feet hose.
1 12-ft. hand pump.
2 ladders.
2 sledge hammers.
1 stone bar.
10 4 iron rollers.
2 wood rollers.
1 crab.
450 feet of old canvas.
1 two-wheeled cart.

That on the 9th day of February, 1900, the plaintiff demanded the said chattels from the defendant, in those possession the same then wrongfully were; but that the defendant neglected and refused, and does continue to neglect and refuse, to deliver the said chattels or any of them to the said plaintiff; and has as aforesaid converted the same to its own use.

By reason of the premises the plaintiff has suffered great damages, to wit, damages in the sum of twelve thousand (12,000) dollars.

W. H. SPENCER,
Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts.

Endorsed: 42. November term, 1900. W. H. Spencer, etc., *vs.* Duplan Silk Co. Filed Oct. 18, 1900. Statement of claim. R. E. Wright, &c.

In the Court of Common Pleas of Lehigh County, of Nov. Term, 1900.

W. H. Spencer, etc., *vs.* Duplan Silk Company. } No. 42.

And now, Nov. 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead within ten days or judgment.

R. E. WRIGHT, *Attorney.*

Endorsed: No. 42. Term, 1900. W. H. Spencer, *et al.*, *vs.* Duplan Silk Company. Præcipe for rule to plead.

11 In the Court of Common Pleas of Lehigh County, of Nov. Term, 1900.

W. H. SPENCER ET AL. *vs.* DUPLAN SILK COMPANY. } No. 42.

And now, Nov. 13, 1900, plaintiff, by his attorney, enters rule on defendant to plead within ten days or judgment.

From the records.

Teste: JOHN F. STINE, *Prothonotary*, Per WM. H. SNYDER, *Deputy*.

Endorsed: No. 42. Term, 1900. W. H. Spencer, *et al.*, trustees, *vs.* Duplan Silk Company. Rule to plead Nov. 13, 1900. Service accepted. Frank Jacobs, attorney for defendant.

STATE OF PENNSYLVANIA:

Lehigh County Common Pleas Court, of November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Bankrupts, *vs.* DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Petition for Removal to the Circuit Court of the United States for the Eastern District of Pennsylvania.

To the honorable the judges of the court of common pleas, held in and for the county of Lehigh:

Your petitioner, The Duplan Silk Company, respectfully shows to this honorable court that it is the above named defendant in this suit: that said above entitled suit is of a civil nature; and that the matter and amount in dispute in this suit exceeds the sum or value of two thousand dollars ($2,000), exclusive of interest and costs; and

12 That the controversy in this suit is wholly between citizens of different States: that the plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, was, at the time of the commencement of this suit and still is a citizen of the State of

Pennsylvania, residing at Williamsport, in said State; and the said James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, were, at the time of the commencement of this suit and still are citizens of the State of Pennsylvania; and that the defendant, The Duplan Silk Company, your petitioner, was, at the time of the commencement of this suit, and still is, a citizen of the State of New York and of no other State—the said company having been organized under the laws of the State of New York; that your petitioner never was incorporated under the laws of Pennsylvania or any State other than the State of New York; that your petitioner has its principal office at New York city, in the State of New York; and that your petitioner desires to remove this suit before the trial thereof, into the next circuit court of the United States, to be held in the eastern district of Pennsylvania.

And your petitioner offers and files herewith a bond with good and sufficient surety, for your petitioner's entering in the United States circuit court, for the eastern district of Pennsylvania, at the first day of its next session, a copy of the record in this suit, and for its paying all costs that may be awarded by said circuit court, if said circuit court should hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays your honorable court to proceed no further herein except to make the order of removal required by law, and to accept this petition and bond, and to cause the record herein to be removed into said circuit court of the United States for the eastern district of Pennsylvania.

And your petitioner will ever pray, etc.

DUPLAN SILK COMPANY,
By H. SCHNAKENBERG, *Treasurer.*

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Schnakenberg, being duly sworn according to law, deposes and says that he is the treasurer of The Duplan Silk Company, your petitioner, and that the statements set forth in the foregoing petition are true.

HENRY SCHNAKENBERG.

13 Sworn to and subscribed before me this 15th day of November, A. D. 1900.

R. M. G. DODGE,
Notary Public.

Kings Co. certificate filed in New York Co.

STATE OF NEW YORK, }
County of New York, } *ss:*

I, William Sohmer, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court

of record, do hereby certify that R. M. G. Dodge, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 15th day of November, 1900.

WM. SOHMER, *Clerk.*

Endorsed: No. 42. Nov. term, 1900. Spencer, trustee *vs.* Duplan Silk Co. Petition for removal of case to U. S. circuit ct. Filed Nov. 19, 1900. D.

In the Court of Common Pleas for the County of Lehigh, November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Bond.

Know all men by these presents that we, The Duplan Silk Company, the defendant in the above cause, as principal, and
14 Wm. Jay Turner, of Philadelphia, Pa., as surety, are held and firmly bound unto W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupt, the plaintiff in the above entitled cause, in the sum of five hundred dollars ($500), lawful money of the United States of America, to be paid to the said plaintiff, his certain attorney, successor or assigns, to which payment well and truly to be made, we and each of us bind and oblige ourselves and our and each of our successors and assigns and every of them, firmly by these presents.

Witness, the seals of the said The Duplan Silk Company, and the said Wm. Jay Turner, this 16th day of November, A. D. 1900.

Whereas, a suit has been brought against the said The Duplan Silk Company, by the said W. H. Spencer, trustee as aforesaid, to the above entitled court, term and number;

And whereas, the said The Duplan Silk Company, the defendant as aforesaid, has filed its petition in the said cause for the removal thereof, and of all proceedings and process thereunder into the circuit court of the United States for the eastern district of Pennsylvania.

Now the condition of this obligation is such, that if the said, The Duplan Silk Company, defendant in this cause and petitioner as aforesaid, shall enter in the said circuit court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs which may be awarded by the said circuit court of the United States if the said court shall hold that said suit was wrongfully or improperly removed thereto and shall cause to be done such other and appropriate acts as by the act of Congress, approved March 3, 1875, and other acts of Congress are required to be done for the removal of a suit in the United States circuit court from a State court, then this obligation to be void; but otherwise to be and remain in full force and virtue.

DUPLAN SILK COMPANY,
By H. SCHNAKENBERG, *Treasurer*.
WM. JAY TURNER.

Sealed and delivered in the presence of
A. RATH.

As to Wm. J. Turner.
JOHN HOFFMEISTER.

Endorsed: 42. Nov. T., 1900. Court of common pleas, Lehigh county. No. 42. Nov. T., 1900. Spencer, trustee, *vs.* Duplan Silk Co. Bond. Filed Nov. 19, 1900. D

15 In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee, &c., *vs.* DUPLAN SILK COMPANY. } No. 42.

Now, November 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiffs to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred ($500) dollars with William J. Turner as surety be approved. And that all proceedings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable third Monday of December next.

By the court:

EDWIN ALBRIGHT, *P. J.*

Endorsed: No. 42. Nov. term, 1900. Spencer, trustee, *vs.* Duplan Silk Co. Rule. Filed Nov. 19, 1900.

In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee, &c., *vs.* DUPLAN SILK COMPANY. } No. 42.

Now, November 19, 1900, upon petition of defendant it is ordered that a rule be granted on the plaintiffs to show cause why the record of the above stated case shall not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the said defendant in the sum of five hundred dollars ($500) with William J. Turner as surety be approved; and that all the proceedings in the said case in the court of common pleas of Lehigh county be stayed in the meantime. Rule returnable third Monday of December next.

From the records.

Teste: JOHN F. STINE,
Prothonotary,
Per WM. H. SNYDER, *Deputy.*

16 Endorsed: 42. Nov. T., 1900. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Company. Rule. Nov. 22, 1900. Service accepted. R. E. Wright, for plaintiff.

In the Court of Common Pleas of Lehigh County, November Term, 1900.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Bankrupts, *vs.* DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 42.

Now, November 19, 1900, a rule having been granted on November 19, 1900, on the plaintiff in the above stated case to show cause why the record of said case should not be removed to the circuit court of the United States for the eastern district of Pennsylvania, and the bond of the above named defendant in the sum of five hundred dollars ($500) with William J. Turner as surety be approved and said rule having been served on Robert E. Wright, counsel of record for said plaintiff, returnable the third Monday of December, 1900.

Upon due consideration it is ordered that said rule be made absolute, and that all proceedings in the above stated case in said court of common pleas of Lehigh county be stayed, that the record of said case be removed to the United States circuit court for the eastern district of Pennsylvania, and that the bond of the said defendant in

the sum of five hundred dollars ($500) with William J. Turner as surety, conditioned that it will enter a copy of the record in said case in the said circuit court of the United States on the first day of its next sessions and that it will well and truly pay all costs which may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall cause to be done such other and proper acts as by the act of Congress, approved March 3, 1875, and other acts of Congress are required to be done in the premises, be approved.

By the court.

EDWIN ALBRIGHT, *P. J.*

Endorsed: No. 42. November term, 1900. In the court of common pleas of Lehigh county. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Co. Order of court. Filed Dec. 19, 1900. Frank Jacobs, attorney at law, Allentown, Pa.

17 STATE OF PENNSYLVANIA, } *ss:*
Lehigh County, }

I, John F. Stine, prothonotary of the court of common [SEAL.] pleas in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, are plaintiffs, and Duplan Silk Company, a corporation organized and existing under the laws of New York, is defendant, as the same remains of record before the said court, at No. 42 of November term, A. D. 1900.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Allentown, the 8th day of March, A. D. 1901.

JOHN F. STINE,
Prothonotary.

STATE OF PENNSYLVANIA, } *ss:*
County of Lehigh, }

I, Edwin Albright, president judge of the court of common pleas of the county aforesaid, in the said State, do hereby certify that the aforesaid named John F. Stine, by whom the foregoing exemplification and certificate and record made was at the time of so making the same, and is now the prothonotary of said court, duly commissioned and qualified; to all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; that the seal thereto annexed is the seal of the said court; and that the said exemplification and record — in due form of law, and made by the proper officer.

Witness my hand this 8th day of March, A. D. 1901.

EDWIN ALBRIGHT,
President Judge.

STATE OF PENNSYLVANIA, } ss:
County of Lehigh, }

I, John F. Stine, prothonotary of the court of common pleas, in and for the said county, do certify that the Honorable Edwin Albright, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, president judge of the court of common pleas, orphans' court and court of quarter sessions of the peace, in and for said county, duly commissioned and qualified; to all whose acts
18 as such, full faith and credit are and ought to be given, as well in courts of judicature or elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 8th day of March, A. D. 1901.

JOHN F. STINE,
Prothonotary.

[SEAL.]

Endorsed: No. 6. U. S. C. C., E. D. of Penna. April sessions, 1901. Spencer, trustee, *vs.* Duplan Silk Co. Exemplification of record. Filed March 19, 1901. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania.

W. H. SPENCER, Trustee in Bankruptcy of Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett and Rothrock, Bankrupts,

vs.

DUPLAN SILK COMPANY.

To the clerk of said court:

Enter my appearance for the defendant in above entitled case.

WM. JAY TURNER,
Attorney for Defendant.

March 19, 1901.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sess., 1901. W. H. Spencer, trustee in bankruptcy, etc., *vs.* Duplan Silk Co. Appearance for def't. Wm. Jay Turner. Filed March 19, 1901. Samuel Bell, clerk.

Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York. } No. 6.

19 The defendant in the above entitled case pleads not guilty.

W. JAY TURNER,
Attorney for Defendant.

Endorsed: 6. C. C. U. S., E. D. of Pa. April sess., 1901. W. H. Spencer, trustee in bankruptcy *vs.* Duplan Silk Company. Plea. Wm. Jay Turner, def't's att'y. Filed April 23, 1901. Samuel Bell, clerk. H. R.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY. } No. 6.

Enter our appearance for the plaintiff in the above entitled case.

R. E. WRIGHT,
T. M. B. HICKS,
Attorneys for the Plaintiff.

May 14, 1901.

To Samuel Bell, Esq., clerk.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy, &c., *vs.* Duplan Silk Co. Appearance for plaintiff. R. E. Wright, T. M. B. Hicks. Filed May 6, 1901. Samuel Bell, clerk. H. R.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Co-partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY.
} No. 6.

20 For replication to the plea of the defendant, the plaintiff says, similiter.

R. E. WRIGHT,
T. M. B. HICKS,
Attorneys for the Plaintiff.

May 6, 1901.

To Samuel Bell, Esq., clerk.

Endorsed: 6. April sessions, 1901. W. H. Spencer, trustee, &c., *vs.* Duplan Silk Co. Replication. R. E. Wright, T. M. B. Hicks. Filed May 7, 1901. Samuel Bell, clerk.

And afterwards, to wit, on the 11th day of November, 1901, a jury being called, come to wit:

Samuel F. Houston,	Henry Sloyer,
Louis C. Madiera,	J. Howard Bromley,
Edwin E. Smith, Jr.,	Chas. D. Clark,
Clarence S. Bennett,	Samuel G. Scott,
Wm. R. Wright,	Henry Gransbach,
Robert E. Jarvis,	John Johnson,

who were duly sworn, &c., to try the issue joined.

And afterwards, to wit, on the 11th day of November, 1901, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty-three 00/100 dollars.

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, of April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
} No. 6.

Be it remembered, that in the said sessions, of April, 1901, came the said plaintiff into the said court, and impleaded the said defend-

ant in a certain plea of trespass, &c., in which said plaintiff
21 declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the circuit aforesaid, before the Honorable John B. McPherson, judge of the said court, the eleventh day of November, 1901, the aforesaid issue between the said parties came to be tried by a jury of the said circuit for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and said defendant respectively offered the following evidence, to wit:

United States Circuit Court, Eastern District of Pennsylvania, April Sess., 1901.

SPENCER, Trustee,
vs.
DUPLAN SILK COMPANY. } No. 6.

McPherson, J.

MONDAY, *November* 11, 1901.

Present: T. M. B. Hicks, Esq., for plaintiff; W. J. Turner, Esq., for defendant.

It is agreed that the Duplan Silk Company is a corporation organized and existing under the laws of the State of New York, and was such at the time of the matters which are in controversy in this case.

Plaintiff's counsel offered in evidence exemplification of the entire record in the matter of the petition of James V. Bennett and Samuel W. Rothrock, partners trading as Bennett & Rothrock, for adjudication in bankruptcy, filed No. 802 in bankruptcy in the district court of the United States for the western district of Pennsylvania, duly certified under the seal of the court by the clerk of the court, and the district judge, and particularly showing the adjudication of the said James V. Bennett and Samuel W. Rothrock, partners trading as Bennett & Rothrock, to be bankrupt on January 13, 1900, and the election and qualification of W. H. Spencer, the plaintiff in this case, as the trustee of the said bankrupt estate.

22 Plaintiff's counsel offered in evidence contract dated the 30th of August, 1899, between Bennett & Rothrock and the Duplan Silk Company for the erection of a silk mill at Hazleton, Pennsylvania, which is admitted as a part of the contract, and in

relation therewith offers, duly certified by the prothonotary and presiding judge of the court of common pleas of Luzerne county, Pennsylvania, certified in accordance with the act of Congress, a copy of said contract entered of record to No. 131, on mechanics' lien docket, No. 15, in the office of said prothonotary on September 2, 1899.

And in connection therewith act of assembly of the Commonwealth of Pennsylvania, approved the 26th day of June, 1895, entitled An act to regulate building contracts, where such contracts have as part thereof, either incorporated or separately made, a stipulation that no mechanics' lien shall be filed against the building, whether by the contractor or by any sub-contractor, material man or other person, requiring that such stipulation shall be in writing and shall be recorded in the prothonotary's office in the county in which the land lies.

The offer of this contract and record and act of assembly being solely for the purpose of showing that the materials and tools, constituting all of the chattels in controversy in this case, could not legally have been furnished upon the credit of the Duplan Silk Company or of the silk mill being erected at Hazleton, Pennsylvania, by Bennett & Rothrock.

CHARLES E. WOODNUTT, having been duly sworn, was examined as follows:

By Mr. HICKS:

Q. Where do you reside?

A. At Williamsport, Pennsylvania.

Q. What connection had you with the firm of Bennett & Rothrock?

A. I had the general supervision of their work outside of the city of Williamsport.

Q. State whether or not they were at any time engaged in erecting a silk mill at Hazleton?

A. They were.

Q. Where is Hazleton?

A. In Luzerne county, Pennsylvania.

Q. For whom were they erecting this silk mill?

A. The Duplan Silk Company.

Q. State, if you know, when the work on that mill began.

23 A. At a period subsequent to the 2d of September.

Q. Of what year?

A. 1899.

Q. State whether or not after the bankruptcy of Bennett & Rothrock you made an inventory and valuation of any personal property, materials and tools of Bennett & Rothrock there?

A. I did.

Q. How did you come to do that?

A. Upon the order of the trustee of Bennett & Rothrock.

Q. Were you appointed by the referee in bankruptcy one of the appraisers for that purpose?

A. I was.

Q. Who was appointed in company with you for that purpose?

A. Edgar W. Shaffer.

Q. State what you and Mr. Shaffer did in pursuance of that appointment?

A. We went to the site of the mill, to the property.

Q. When did you do that?

A. I will have to refer to the inventory. (Referring to inventory.) That was on February 1, 1900.

Q. What did you find on that day there?

A. We found a great quantity of building material, lumber, brick, iron, cement, mortar, &c., such materials as enter into the construction of a building of that kind.

Q. State, if you know, to whom that material belonged?

A. To Bennett & Rothrock.

Q. Had you been engaged in charge of their operations in overseeing the building of that mill?

A. I had.

Q. State, if you know, to whom these materials were consigned when they came to Hazleton and were taken there?

A. The most of them were consigned to Bennett & Rothrock.

Q. What, if any of them, were not so consigned?

A. The only thing I am not clear on is the yellow pine.

Q. To whom do you think that was consigned?

A. That was consigned either to Bennett & Rothrock, or to the consignor himself, H. A. Miller.

Q. I understand the yellow pine was bought by Bennett & Rothrock from Mr. Miller?

A. Yes, sir.

24 Q. If it came to Hazleton consigned to Mr. Miller, what was then done with it?

A. It was delivered to Bennett & Rothrock.

Q. By whom?

A. By Mr. Miller.

Q. Have you a memorandum of these chattels before you?

A. I have.

Q. State whether or not, using that to refresh your memory, you can state what all these chattels were, and what at that time they were woath, in your opinion?

A. Do you want this inventory read in its entirety?

Q. I want you to state from your memory, if you have a memory refreshed by that memorandum, what those chattels were, and what at that time they were worth?

A. I find on the first page of this inventory an item of 51,914 feet of yellow pine lumber which had been framed and was in readiness to be placed in the building, that was valued at $32 a thousand, total of $1,661.24. That is made up of a long line of materials, the number of pieces, the size of each piece and the length of each piece

which is itemized here. We have one thousand feet of 5/4 yellow pine stepping at $27.50 per thousand——

The COURT: Why not put this inventory in evidence? The other side can cross-examine on such details as they desire.

By Mr. HICKS:

Q. Have you in your hand the inventory which you and Mr. Shaffer made at that time?

A. I have.

Q. Does this inventory set out all the chattels that you found there belonging to Bennett & Rothrock?

A. It does.

Q. And the valuations which you placed on them at that time?

A. It does.

Q. How long have you been connected with the business of contracting and building?

A. Since 1892.

Q. Were you familiar at the time this inventory was made with the market prices and values of the materials which you have inventoried here?

A. I was.

Q. State whether or not the values which you have placed on these chattels in this inventory were fair valuations?

A. Those prices were based on the cost price of the material
25 to Bennett & Rothrock. In other words, the prices made in this inventory were cost prices as per the bills rendered for the material delivered.

Q. Was that greater or less than the market value of this stuff at this time?

A. That was the market value. In connection with this first item which I read of 51,914 feet at $32 per thousand, that, as I stated, was for material that was framed, and that price of $32 a thousand includes the labor of framing it.

Q. What is the total valuation according to this inventory then of these chattels?

A. $11,843.64.

Q. State whether you were present in Hazleton at any subsequent time when any demand was made, or question discussed, with the manager and president of this company concerning these chattels?

A. I was.

Q. When was that?

A. I cannot give you the date. It was subsequent to this inventory.

Q. How long subsequently, as nearly as you can get at it?

A. I should think within two weeks; but I cannot fix the date.

Q. Who were present at the time this took place at this subsequent date?

A. The president of the Duplan Silk Company, Mr. Duplan, and

Mr. Lipps, the manager of the Hazleton mill, their attorney, yourself and myself.

Q. State what was said to Mr. Duplan and Mr. Lipps in behalf of the trustees, the plaintiff in this case, concerning these chattels?

A. My recollection is that the inventory was presented to him and a formal demand made for the delivery of the materials to the trustee. I cannot state the language that was used, for I do not recall it.

Q. State, if you know, whether or not these chattels were at this time, all of them, in the possession of the Duplan Silk Company?

A. They were, at the mill on the ground.

Q. What answer was made by Mr. Duplan and Mr. Lipps to this demand?

A. They refused to surrender the materials.

Cross-examination.

By Mr. TURNER:

Q. Did they state why they refused to deliver these goods to you?

A. Not to the best of my knowledge.

26 Q. What was your position with Bennett & Rothrock?

A. I had a general supervision of their work outside of the city of Williamsport.

Q. What was embraced in your duties? Did you simply look after the physical part of the work?

A. I was the estimator for Bennett & Rothrock in charge of the work. I made visits from time to time to the different buildings. I made the estimate on this building. My duties called me to the different buildings from time to time to inspect the work as it progressed, and to look after the ordering of the material, to see what materials were needed, and to list them and put them in possession of the firm, so that the materials might be purchased.

Q. You were familiar with the progress that was made upon this building from the time the contract was made?

A. I am.

Q. About the 1st of January did you visit the building?

A. I did.

Q. What was the condition of it at that time?

A. Make that question a little clearer.

Q. About how far was the building completed about the 1st of January?

A. I think about two-thirds of the walls were built; a portion of the roof was on; the bricklayers were at work there, as well as the roofers. The work was going on altogether.

Q. What do you mean when you say two-thirds of the walls were completed?

A. Two-thirds of the outside walls of the building, the brick walls.

Q. You say that the roof was going on. Would they put the roof on without the walls being completed?

A. The walls were completed at a certain point. Take one corner of the building; those walls were put up, and we started the roof at that point, and followed the bricklayers as fast as we could.

Q. Were you at the building between January 1st and the time you went to make this inventory?

A. I think I was.

Q. About when?

A. Probably the 4th or 5th of January.

Q. Were Bennett & Rothrock going ahead with the construction of the building at that time?

(Counsel for the plaintiff objects to this line of questions, first, because it is not proper cross-examination, and, secondly, because it concerns matters which are irrelevant and immaterial.
27 There was nothing in the witness' testimony in chief which could form a basis for cross-examination as to the progress of the building.)

Mr. TURNER: I think Mr. Hicks is right. I will call the witness in chief as to the condition of affairs.

Q. State if you were familiar with the condition of the account between Bennett & Rothrock and the Duplan Company?

A. No; I had nothing to do with that whatever.

Q. That was not involved in your duties in connection with the matter?

A. In no way.

Q. You have in this inventory two hundred and six thousand hard bricks, valued at $1,442? Is it not a fact that these bricks, or a very large number of them, were subsequently claimed by a firm in Allentown, and delivered to that firm?

A. I am told that they were.

Q. Do you know whether that is the fact?

A. I do not. Not of my own knowledge.

Q. How do you know that these materials that were on the ground on February 8th belonged to Bennett & Rothrock?

A. I know that they were bought by Bennett & Rothrock. I know the order was placed for them by Bennett & Rothrock. I know they were consigned to Bennett & Rothrock, with the exception as I noted a bit ago.

Q. Were you there when the goods came?

A. I was there when some of them came. Not all of them.

Q. What proportion arrived during your presence there?

A. A very small proportion.

Q. About what proportion of these twelve thousand dollars?

A. That is a question it would be impossible for me to answer.

Q. You merely supposed that they belonged to Bennett & Rothrock from the fact that you had ordered materials of like nature to be shipped there?

A. No. I know they were consigned to Bennett & Rothrock, because I handled most of the freight bills, and paid the freight on them, and receipted for a great many of them.

Re-direct examination.

By Mr. HICKS:

Q. When you went there and made this inventory, were any of these materials that you have inventoried built into this building?
A. None whatever.
Q. What condition were they in?
A. They were piled on the ground.

28 EDGAR W. SHAFFER, having been duly sworn, was examined as follows:

By Mr. HICKS:

Q. Where do you reside?
A. At Williamsport, Pennsylvania.
Q. What is your occupation?
A. My occupation is foreman in construction of the buildings.
Q. State whether or not you were in the employ of Bennett & Rothrock from August 30, 1899, to January 13, 1900?
A. I was.
Q. Were you concerned in any way for them in the construction of the mill of the Duplan Silk Company at Hazleton?
A. I was there, foreman.
Q. You were the foreman of Bennett & Rothrock in that operation?
A. Yes, sir.
Q. State whether or not you were appointed by the referee in bankruptcy one of the appraisers of the bankrupt estate of Bennett & Rothrock?
A. I was.
Q. Did you, in company with Mr. Woodnutt, make the appraisement that he testified about at Hazleton?
A. I did. I was one; yes, sir.

The COURT: Is there any dispute on the contents of this inventory?
Mr. TURNER: There is no dispute on it except one item of bricks.

By Mr. HICKS:

Q. Is this inventory correct?
A. Yes, sir. My name is attached there. It is all right.
Q. Where was this material when you inventoried it?
A. We found it on the ground of the Duplan silk mill.
Q. State, if you know, to whom this material came consigned to Hazleton?
A. The most of it to Bennett & Rothrock. I am not sure whether the yellow pine was consigned to them or to H. A. Miller.
Q. H. A. Miller is the person from whom Bennett & Rothrock bought it?
A. Yes, sir.

Q. If it came there consigned to Miller, what did Mr. Miller do with it?

29 A. He released it, of course, to Bennett & Rothrock.

Q. It came into the possession of Bennett & Rothrock?

A. Yes, sir.

Q. It seems the defendant raises here some question about some of that brick. Do you know anything about it?

A. I do.

Q. What do you know about that?

A. William H. Taylor & Company, of Allentown, claimed thirty-seven thousand of these brick.

Q. Is that all you know about it?

A. That is all I know.

Cross-examination.

By Mr. TURNER:

Q. Do you know whether those bricks were returned to Taylor, or whether Taylor took them from the ground?

A. Mr. Taylor used them right on the ground in the construction of engines pits, etc.

By Mr. HICKS:

Q. They were built into the mill afterwards?

A. They were built into the mill afterwards.

By Mr. TURNER:

Q. Do you now state that they should not have been included in the inventory?

A. Not rightfully; no, sir. They should not have been included.

By Mr. HICKS:

Q. What were those thirty-seven thousand bricks which you say in your opinion should not have been included in the inventory, inventoried at—at what value?

A. The bricks were in common with the bricks we had there. They should be at the same price.

Q. What is that price?

A. Seven dollars a thousand.

Mr. HICKS: Those bricks amount to $259. We might exclude them from consideration.

Plaintiff states that the value of the material claimed is $11,583, instead of $11,843.

Plaintiff's counsel offers in evidence inventory identified and proved by the witnesses for the purpose of showing the materials and their value.

(Plaintiff rests.)

30 *Defendant's Evidence.*

EMORY J. LIPPS, having been duly sworn, was examined as follows:

By Mr. TURNER:

Q. What is your business?
A. I am a silk manufacturer.
Q. What position do you hold with the Duplan Silk Company?
A. I am general manager.
Q. Did you, in the year 1899, make a contract between Bennett & Rothrock and the Duplan Silk Company for the erection of a mill at Hazleton?
A. Yes, sir. The Duplan Silk Company did.
Q. Did you on their behalf?
A. I did, yes; acting as their agent.
Q. State whether that is a part of the contract which was made. (Contract shown witness.)
A. Yes, sir. This is the contract that Mr. Rothrock and myself drew up in our own office and signed it there in the presence of some of our employés.

Plaintiff's counsel admits that the signature to the contract is the signature of Bennett & Rothrock.

Q. At the same time was there any other contract made?
A. There was no other contract made, but as that is a printed form, and there was not room sufficient on there to embody the clause that we wanted on there, we added another paper to it principally dealing with the lien clause, and the price per diem in case the building should not be finished on time.
Q. State whether that is the supplemental contract. (Paper shown witness.)
A. This seems to be a copy of it.
Q. What became of the original?
A. The original was filed in the recorder's office in Luzerne county, as the law required.

(It is admitted that the paper identified by the witness is the supplemental contract.)

Q. Can you state whether this is the special agreement which is referred to in this uniform contract?
A. Yes, sir. This special agreement mentioned here is that other paper that we have drawn up.
Q. Please tell us what progress was made by Bennett & Rothrock with the work comprehended under this contract.

31 (Counsel for plaintiff requests counsel for defendant to state what they now propose to prove by this witness.)

Mr. TURNER: I propose to show by this witness that the contractors, in violation of their contract, did not proceed with the work in accordance with the terms of the contract, and that in consequence of the delay upon their part, in fact, in consequence of the cessation of the work completely, that this contract was terminated on the 11th day of January, 1900, as provided in the contract.

(Question objected to, because by the contract the architect is made the judge.) (Objection overruled.)

A. Do you mean during the whole course of time they were working at the building?

Q. State what was the condition of the building on the 15th day of December, 1899, and what was the condition thereafter until the 11th of January, 1900.

A. The building proceeded for some time quite satisfactorily, but the beginning of December there were but very few people at work, and the work was very dilatory, and I myself asked Mr. Rothrock several times why he could not put more men at work, and he told me he could not get the people, he could not get them. A little later on, about the 10th or 12th of December, Mr. Rothrock came and asked for money, and he wanted me to——

(Objected to. Objection overruled.)

The WITNESS: He asked me whether we could not pay him more money than what the contract called for, because he wanted the money badly. I told him that personally I could not advance any money to him, but if he presented his case to the board of directors of the Duplan Silk Company they might favor him by advancing him money which he was not entitled to. Accordingly we had agreed upon a meeting in New York. Mr. Rothrock was present, and he presented his case, saying that he was very short of money, and unless he could get some money from us in advance he could not pay for the material he had ordered, and the men would put him into bankruptcy. We should therefore advance him money beyond what the contract called for.

(Counsel for the plaintiff object to any testimony being offered as to the state of the accounts between Bennett & Rothrock and the Duplan Silk Company, and also as to the circumstances being detailed by the witness as to conversations with Mr. Rothrock concerning their accounts, as irrelevant, and further asks that the court will strike out the testimony already introduced upon that subject.)

The court refuses to strike out the testimony.

(Exception for plaintiff.)

The WITNESS: We had a meeting in New York city, and
32 upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him fifteen thousand dollars, he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money.

We knew the material was there, and we consequently gave him the fifteen thousand dollars. That was on December 16th.

By Mr. TURNER:

Q. What was he entitled to under his contract at that time?

A. Only five thousand dollars. We had already paid him previous to that another five thousand dollars in order to help along.

Q. So the amount you had paid to the 15th of December was twenty thousand dollars, although he was entitled to but five thousand dollars?

A. Yes, sir; he was entitled to five thousand dollars when the excavations were done, and ten thousand dollars when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him five thousand dollars, and we advanced him fifteen thousand dollars more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground.

Q. What happened after that payment was made?

A. After that payment was made they began to work at it faster then, but then they stopped entirely, so that by Christmas, or a day or two after Christmas, there hardly anybody remained on the ground, and after New Year's there was no one there at all, excepting Mr. Shaffer, who was superintendent on the ground. He was the only man I met then. I think everybody else was gone. There were a few people working, digging a trench there for a heating duct, but that was under a sub-contract, and the sub-contractor had received no money, but had a bondsman in Williamsport that went on the bond of Bennett & Rothrock, and therefore he said, "If I complete my work irrespective of the failure of Bennett & Rothrock I can collect from the bondsman." Therefore he continued the work. He was the only party at work then.

Q. Was it in consequence of that condition of affairs that you sent to Bennett & Rothrock this notice? (Notice shown witness.)

A. Yes, sir. On the 6th of January it was reported that they had assigned, and five days thereafter I notified them that as they failed to prosecute the work——

By Mr. HICKS:

Q. This was a written notice?

33 A. Yes, sir. That we would take the work in our own hands.

Mr. Turner proposed to read the notice.

Mr. HICKS: There were three letters all enclosed in one communication. We object to the notice being read unless they are all read.

Mr. TURNER: I have called upon the plaintiff in this case to produce the original notice which was served upon them by Mr. Lipps, the manager of the defendant, with respect to the termination of

this contract. There happens to be some other correspondence. I do not want that. If they want to put that in they can do so.

Counsel for plaintiff states that in response to a notice of defendant he produced the communication received by Bennett & Rothrock from the Duplan Silk Company, consisting of three separate letters, all dated January 11, 1900, and all coming to Bennett & Rothrock under one cover as the communication of the Duplan Silk Company to them on that date.

The COURT: If that is the fact they ought to be all in.

Mr. TURNER: One of these notices is addressed to the Duplan Silk Company by Mr. Lipps himself. I do not object to reading them all.

Mr. Turner read in evidence the following papers:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY.
E. J. LIPPS, *General Manager*."

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their
34 failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

E. J. LIPPS."

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUPLAN SILK COMPANY."

Mr. TURNER: I call your honor's attention to the fact that in this contract Mr. Lipps is specifically made, with the architects, the party in charge of the building.

Q. Who were the architects?

A. Messrs. William Steele & Son, of Philadelphia.

Q. State whether or not that is the certificate of William Steel & Son with reference to this matter?

A. Yes, sir; it is.

Certificate of William Steel & Son, dated Philadelphia, January 11, 1900, offered in evidence.

Mr. HICKS: I should like to cross-examine the witness before the paper is offered in evidence.

Q. Concerning the communication from William Steel & Son, when did you first receive that?

A. I could not say. It is undoubtedly dated. I went to William Steel & Son after they had failed to put the matter before them, because William Steel & Son——

Q. What I want to know is when you first got this paper from William Steel & Son?

A. I do not remember that now. I could not say what date it was.

Q. This paper is dated January 11, 1900. I desire to ask whether you received that paper on January 11, 1900?

A. I could not say. I went to William Steel & Son myself, and told them that I had notified these people, and I, in conjunction with William Steel & Son, acted as overseer of the building. The contract calls for that.

Q. Then, as I understand you, you sent these notices dated January 11, to Bennett & Rothrock before you received this from William Steel & Son; is that true?

35 A. It is the same date. I do not know whether I mailed this in the evening or not. I could not say that. I went to William Steel & Son and asked them whether I was right, and they said "Yes, you have authority to do it."

Q. I want to know when this was written?

A. It might have been in the morning of January 11. I am not sure of that.

Q. Do you think you received that from William Steel & Son on the morning of January 11th?

A. I could not say. I do not know what date it was.

Q. Where is the office of William Steel & Son?

A. In the Witherspoon building in this city?

Q. Your office is in South Bethlehem, Pa., is it not?

A. Yes, sir.

Q. You sent these notices of January 11 to Bennett & Rothrock from South Bethlehem, did you not?

A. I believe so; yes, sir.

Q. Were you in Philadelphia on that date?

A. I do not know as to that. I may not have been. I do not know.

Q. Then you cannot say that you received this certificate from

William Steel & Son on the 11th of January, 1900, the day it purports to be dated?

A. No, sir; I could not say that. I do not know whether I sent this notice previously to going to William Steel & Son or whether I went to William Steel & Son first and then sent the notice. I do not know.

Q. Did you not just say a few moments ago you went to William Steel & Son and told them about having sent these notices to Bennett & Rothrock, and they said to you that was right?

A. Perhaps I did.

Q. Did you not say that just a moment ago?

A. I think I did.

Q. Then is it not a fact that when you went to William Steel & Son and told them that you had sent these notices to Bennett & Rothrock, and they told you that was right, you then asked them, or subsequently to that you asked them, if not just then, to give you this written certificate that was read?

A. I think so; yes, sir.

Q. In pursuance of that request, they gave you this written certificate?

A. Yes, sir. I went there and asked them for that certificate.

36 By Mr. TURNER:

Q. As a matter of fact, had you not talked with the architects, William Steel & Son, with regard to delays in the completion of this building a number of times prior to this notice?

A. I believe I did.

Mr. Turner proposed to read certificate of William Steel & Son. (Objected to.)

Mr. Turner renewed offer of certificate of William Steele & Son, dated January 11, 1900.

(Plaintiff's counsel objected, first, because by the testimony of the witness on the stand, who has identified this notice, it was not in pursuance thereof that any notice was served under the contract upon Bennett & Rothrock. Second, because the notice does not purport to be the certificate required by the terms of the contract from the architect. Thirdly, as incompetent and irrelevant; and for the further reason that it is not shown by the evidence when this certificate was given, or that it was given before the adjudication that Bennett & Rothrock were bankrupts.)

The COURT: We will receive the paper for whatever effect it may have on the case.

(Exception for plaintiff.)

Mr. Turner read certificate of William Steel & Son, dated January 11, 1900.

By Mr. TURNER:

Q. In pursuance of that notice did you take possession of these materials on the ground?

A. Yes, sir.
Q. You went ahead and completed the building?
A. Went ahead and completed the building.
Q. When was the building actually completed?
A. I do not remember the date, but it is given in some of the papers there. It must have been some time in the summer of that same year.
Q. Were you able to complete this building for the cost price stipulated in the contract?

(Objected to as irrelevant. Objection sustained.)

Q. Were these materials actually used in the construction of the building?
A. The materials that were lying on the ground?
Q. The materials that are specified in the inventory which has been testified to here?
A. I have every reason to believe they were; yes, sir.

37 Cross-examination.

By Mr. HICKS:

Q. I call your attention to the communications consisting of these three papers, all dated January 11, 1900, which you sent on that day to Bennett & Rothrock, and ask you whether or not all three of these communications are not in your handwriting?

(Papers shown witness.)

A. Yes, sir; they are all in my handwriting.

EDGAR W. SHAFFER, recalled.

By Mr. TURNER:

Q. You stated that you were the foreman or superintendent of Bennett & Rothrock?
A. I was employed as foreman.
Q. Can you tell us when your employment ceased on this building?
A. I can by referring to my time book.

Counsel for the plaintiff requests counsel for defendant to state what they propose to prove by this witness.

Mr. TURNER: I propose to prove by this witness that the contractors absolutely stopped work on this building on the 6th of January, and probably before.

(Objected to on the ground that the written contract between the parties provides the only method, to wit, on the certificate of the architect, by which the contract permits the Duplan Silk Company to take possession of the tools and materials, and that proof by this witness as to progress of the work would therefore be immaterial under this contract.)

(Objection overruled. Exception for plaintiff.)

The WITNESS: (Referring to time book.) January 6, 1900.

Q. January 6, 1900, you left the premises?

A. Yes, sir.

Q. Were there any men working there for Bennett & Rothrock at that time?

A. Only under sub-contract.

Q. When had Bennett & Rothrock's men been withdrawn from the work?

A. Those men out of the town of Hazleton stayed there; near every man that was away from town stayed with me until I told them that Bennett & Rothrock had failed, and that was on
38 January 6. Men from Hazleton, quite a number had stopped work, dropped off occasionally. I could not give any exact date when they quit.

Q. You were one of the appraisers of these materials?

A. Yes, sir.

Q. And I think you were subsequently employed by the Duplan Company, to finish this building?

A. Yes, sir.

Q. Were these materials that are claimed in this suit used in the completion of the building?

A. They were. They were all used, with the exception of possibly four or five thousand feet, which were left, and we sold some.

Cross-examination.

By Mr. HICKS:

Q. Four or five thousand feet of what was left that you sold?

A. There was some yellow pine timber left, hemlock, and the hemlock had been partially used; scaffolding and shelving, and was sold as second-class lumber, used lumber.

Q. The Duplan Silk Company sold those things?

A. They did; they directed me to sell them.

Q. What became of the tools?

A. The tools that were left were used in the construction of the building. They were badly used. In a large building like that they were pretty well used up, but what was left, wheelbarrows and such things, I sold under their directions.

Q. You sold for the Duplan Silk Company?

A. Yes, sir. There were some that were not sold, which were retained.

Mr. Turner offered in evidence contract dated August 30, 1899, between Bennett & Rothrock and the Duplan Silk Company through E. J. Lipps, their representative and general manager.

Together with a certified copy of the special agreement referred to therein, the original of this agreement having been filed of record at Williamsport.

Mr. Turner also offered in evidence various notices read; also certificate of William Steel & Son, the architects.

(Testimony closed.)

(At 1 o'clock a recess was taken until 2 p. m.)

39 *Charge of the Court.*

McPHERSON, *J.*:

GENTLEMEN OF THE JURY: The question here is one of law, depending on the construction of these papers; and I therefore instruct you to render a verdict for the amount of the plaintiff's claim, subject to the point reserved, whether there is any evidence to go to the jury in support of the plaintiff's case. I shall examine these papers in the light of the argument of counsel, and consider whether judgment should be entered for the defendant or not.

(*Exception for Defendant.*)

And thereupon the counsel for the said defendant, Duplan Silk Company, did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion so excepted to, do not appear upon the record.

The said counsel for the said defendant, Duplan Silk Company, did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the said defendant, Duplan Silk Company, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 24th day of January, 1902.

JOHN B. McPHERSON, *Judge.* [SEAL.]

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Bill of exceptions. Wm. Jay Turner, def't's attorney. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

40 And now, November 11, 1901, comes the defendant, The Duplan Silk Company, by its attorney, Wm. Jay Turner, and moves for judgment *non obstante veredicto*, in the above entitled case.

Endorsed: 6. U. S. C. C., E. D. of Pa. April session, 1901. W. H. Spencer, trustee in bankruptcy *vs.* Duplan Silk Co. Motion for judgment *non obstante veredicto*. Wm. Jay Turner, def't's att'y. Filed January 22, 1902. Samuel Bell, clerk.

And afterwards, to wit, on the 11th day of November, 1901, come the parties aforesaid by their counsel aforesaid, and this cause being called for argument sur defendant's motion for judgment *non obstante veredicto*, and having been argued by counsel for the respective parties and the court not being fully advised in the premises, takes further time for the consideration of the same.

And afterwards, to wit, on the 18th day of January, 1902, come the parties aforesaid, by their counsel aforesaid, and the court being fully advised in the premises, renders the following opinion, viz:

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee of Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

Motion by Defendant for Judgment Non Obstante Veredicto.

MCPHERSON, *J.*:

The facts in this case were not disputed and may be briefly outlined as follows: Bennett & Rothrock, who were contractors and builders, had agreed to erect a silk mill for the defendant in Hazleton, Pennsylvania. The 5th article of the contract is in these words:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after — days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further pay-
41

ment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The contract was not recorded, and there is no evidence that any of the creditors knew of its provisions. On January 13, 1901, a large quanity of building material was upon the ground in the neighborhood of the mill, having been brought to that point for the purpose of being built into the structure in accordance with the contract. This material was the absolute property of Bennett & Rothrock, having been bought with their money, or on their credit, and delivered to them without conditions. Upon January 13, Bennett & Rothrock, having filed a voluntary petition, were duly adjudged bankrupts, and W. H. Spencer, the present plaintiff, was afterwards elected their trustee. He thereupon demanded delivery of the material from the defendant, by whom possession had been taken, but delivery was refused and the material was converted to the defendant's use by being built into the mill. This action of trover was accordingly begun to recover the value of the property thus converted.

Two defenses are urged to the suit, of which the first is founded on the fifth article of the contract and upon certain action taken thereunder. This action was as follows: E. J. Lipps is named in the contract as general manager of the defendant company, and William Steele & Son as architects, these three persons being empowered to act for the purposes of the contract as agents of the silk company. Early in January, owing to the increasing financial difficulties of Bennett & Rothrock, work on the building had nearly ceased, and on January 6, or perhaps even earlier, the contractors practically abandoned the enterprise. On January 11 Mr.
42 Lipps, whose office was in South Bethlehem, some miles distant from Hazleton, addressed the following letter to the defendant:

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.:

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with the said Duplan Silk Company under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided therein.

E. J. LIPPS."

This letter states that Mr. Lipps was acting as "overseer and contractor for the architects for the Duplan Silk Company building in course of construction at Hazleton, Pa.;" but there is no evidence that he had any such authority to act for the architects. He himself did not so testify, nor were the architects called to corroborate the allegations contained in the letter; while the contract declares him to be, what in truth he was, the general manager of the defendant, and one of its agents for the purposes of the contract. The letter just quoted was delivered by Mr. Lipps to himself as the general manager of the defendant, and thereupon, acting now as the Duplan Silk Company, he wrote and mailed to Bennett & Rothrock, upon the same day, the following letter:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUNLAP SILK COMPANY."

This letter was enclosed with a communication also written by Mr. Lipps, the "notification" referred to therein being the first of the letters just quoted:

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill build-
43 ing at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY,
E. J. LIPPS,
General Manager."

After these communications had been written and sent Mr. Lipps came to Philadelphia, where the architects lived, and obtained from them the following paper:

"PHILADELPHIA, *January* 11, 1900.

Whereas we are informed by E. J. Lipps, general manager for Duplan Silk Company, and who has been in charge of the construction of a certain building in Hazleton, Pa., which has been in the course of erection under a contract entered into between Duplan Silk Company and Bennett & Rothrock, contractors, that the contractors in violation of their said contract have since January 6th abandoned

work upon the said contract, and that he has notified the contractors of the intention of the Duplan Silk Company to terminate the employment of the contractors and to complete the operation, we hereby certify our approval of said action and declare that the neglect and failure of the contractors was sufficient ground for the same.

WM. STEELE & SON."

This certificate is dated January 11, and, in the absence of definite evidence to the contrary, that date may be assumed to be correct, although I have no doubt that the certificate was not obtained until a later day. At all events, it was the last step in the transaction instead of the first. Pursuant to these notices, the defendant entered upon the premises, and on January 15 took possession of the material heretofore referred to, this being two days after the title of the bankrupts had passed by operation of law to their trustee.

It must be conceded, I think, that there are serious difficulties in the defendant's path. In the first place, the express terms of article 5 make the architects' certificate a condition precedent to the termination of the employment, and it appears by the undisputed evidence that no such certificate had been given at the time the contractors were notified that their employment had been brought to an end. It is true that Mr. Lipps professed to give such a certificate as "overseer and contractor for the architects," but as I have already stated, there is no evidence that he occupied this position or was authorized to act for them in such a matter. On the contrary, the clear evidence is that he was simply the general manager of the defendant
44 and one of the overseers of the building upon its behalf.

Neither, I think, can the certificate of the architects—assuming it to have been given on January 11—be properly regarded as a ratification of Mr. Lipps' previous action, for the contract, as I think, certainly contemplates that the architects shall act upon their own knowledge in giving a certificate that is to be followed by such serious consequences to the contractors, while it will be observed that the architects do not profess to act upon what they themselves have observed of the contractors' failure to go on with the work, but plant themselves distinctly upon the information that is said to have been received from Mr. Lipps. It is doubtful whether such a certificate is sufficient to sustain a forfeiture of the contractors' property, and the decision of the case might perhaps be put upon this ground; but there are other difficulties that seem to be as serious, and one of them perhaps even more difficult to overcome. The 5th article of the contract, it will be noticed, provides that the company may, in a certain contingency, "enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor." This clause contemplates that the silk company might do either one of two things; it might enter upon the premises and use the material there to be found for the purpose of completing the work, or it might enter upon the prem-

ises and provide its own material for the same purpose. Now it is plain from the foregoing notices, that the declared purpose of the company is simply to "enter and take possession of the above named premises," and that nothing whatever is said about an intention to take possession of the contractors' material. Under this ambiguous declaration, therefore, the entry might well be regarded as being simply for the purpose of providing other material and going on with the work, and I think it very doubtful whether such a notification—which must of course be strictly construed, as the purpose was to enforce a forfeiture—was sufficient to justify the silk company in taking possession of the contractors' bricks, lumber and other property on the ground.

But in addition to these difficulties, there is the more serious objection, that, even if the silk company is to be regarded as having correctly attempted to exercise a privilege reserved to it by the contract, nevertheless that privilege cannot be successfully invoked against the title of the trustee in bankruptcy. It is urged by the company, that the title of the trustee is no greater than the title of the bankrupts; and that, as the privilege reserved by the 5th article of the contract could undoubtedly have been enforced against the bankrupts themselves, it is enforceable against the trustee also. It is no doubt true, speaking generally, that under section 70*a* the trustee takes no better title to the property than the bankrupt himself possessed; but there are exceptions to this statement, as plainly appears from other provisions of the act. Under certain circumstances the trustee is the representative of the creditors rather than of the bankrupt, in relation to the property of the estate, and he may unquestionably exercise rights, and enforce a title, that the bankrupt himself could neither enforce nor exercise. For example, with regard to property that the bankrupt has fraudulently transferred, the trustee may undoubtedly recover it for the estate, although it is also undoubted that the bankrupt himself could not undo his own fraudulent transactions. So also, it is provided by the act, in section 67, clause *a*—and this closely concerns the subject now in hand—that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Whatever may be the character of the right, or the privilege, reserved to the defendant company by the 5th article of the contract, it cannot be more binding upon the bankrupt estate than if it were a lien, and it may, therefore, properly be treated as if that were its true nature. Under the law of Pennsylvania, as repeatedly declared by its highest court, it is beyond controversy that this right to take possession of the bankrupts' material could not have been enforced against other creditors of the bankrupt, seeking to enforce their own claims by appropriate legal process. If, for example, another creditor of the bankrupts had obtained judgment against them and had levied upon the property in question, the silk company could not have defeated the execution by attempting to exercise its right to take possession of the bankrupts' material. Secret liens against

property are obnoxious to the law of Pennsylvania, and at the best the privilege now sought to be invoked by the silk company was a secret lien, and not made known to the public by being put upon record—indeed, there is no provision of law for recording such contracts—and not actually disclosed to the creditors so far as appears from the testimony now before the court. I think, therefore, it is clear that the trustee under section 67*a* is entitled to invoke the aid of the law of Pennsylvania to prevent the enforcement of this privilege, although the bankrupts themselves might not have been allowed so to do; and, if the Pennsylvania law upon this subject is applicable, there can be no doubt that the defence now under discussion is unavailing.

The second defence only needs a few words. It was proved, that in December, 1900, the bankrupts applied to the silk company for an advance of money, and that the company advanced them $15,000 more than the contract required, believing—so it was testified by Mr. Lipps—that the material upon the ground was sufficient security for this sum. It is urged that this transaction was equivalent to a pledge of this material, and therefore that the company was justified in taking possession of it in repayment of the advance. The
46 testimony, in my opinion, does not justify such a conclusion. It does not show that a contract of pledge was made between the bankrupts and the company; but, at the most, only shows that the company probably believed that, if the contractors should get into difficulties, there was enough material on the ground that could be taken possession of by the company under the 5th article to reimburse the sum advanced. Even assuming, however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privilege reserved under the 5th article, would also be stricken down by the Pennsylvania law in favor of other creditors.

It is, I think, unnecessary to pursue the subject further. In my opinion, the plaintiff is entitled to recover, and the defendant's motion for judgment notwithstanding the verdict is accordingly refused.

Exception to the defendant.

Endorsed: 6. April session, 1901. Spencer, trustee, *vs.* Duplan Silk Co. Opinion refusing defendant's motion for judg. *non obstante veredicto*. Filed January 15, 1902. Samuel Bell, clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Co-partners as Bennett & Rothrock, Bankrupts,
vs.
DUPLAN SILK COMPANY. } No. 6.

Enter judgment against the defendant on the verdict of the jury, *sec. leg.*

T. M. B. HICKS,
Attorney for the Plaintiff.

January 17, 1902.

To Samuel Bell, Esq., clerk.

Endorsed: No. 6. April S., 1901. Spencer, trustee, *vs.* Duplan Silk Co. Precipe for judgment. T. M. B. Hicks. Filed January 18, 1902. Samuel Bell, clerk.

47 United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY. } No. 6.

Assignment of Errors.

The defendant in this action in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred upon the trial of the cause, to wit:

1st. The court erred in directing the jury to find a verdict for the plaintiff.

2nd. The court erred in overruling the defendant's motion for judgment *non obstante veredicto.*

3rd. The court erred in entering judgment upon the verdict in this case in favor of the plaintiff and against the defendant.

WM. JAY TURNER,
Attorney for Defendant.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Assignment of errors. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
No. 6.

48 *Petition for Writ of Error.*

And now, January 24, 1902, comes The Duplan Silk Company, defendant herein, by its attorney, Wm. Jay Turner, and says that on the 15th day of January, 1902, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which more in detail appear from the assignment of errors which is filed with this petition. Wherefore this defendant prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the third circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said circuit court of appeals.

WM. JAY TURNER,
Attorney for Defendant.

Allowed
BY THE COURT.

Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Spencer and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Petition for writ of error. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

United States Circuit Court, Eastern District of Pennsylvania, April Sessions, 1901.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock,
vs.
DUPLAN SILK COMPANY.
No. 6.

Bond Sur Writ of Error.

Know all men by these presents, that we, The Duplan Silk Company, as principal, and The City Trust, Safe Deposit and Surety Com-

pany of Philadelphia, surety, are held and firmly bound unto the plaintiff, W. H. Spencer, trustee in bankruptcy of Bennett &
49 Rochrock, in the just sum of twenty-four thousand three hundred and sixty-six dollars ($24,366) to be paid to the said plaintiff, his certain attorneys, executors, administrators, successors in the trust, or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this twenty-fourth day of January, A. D. 1902.

Whereas lately in the United States circuit court for the eastern district of Pennsylvania, in a suit depending in said court between W. H. Spencer, trustee in bankruptcy of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, plaintiff, and The Duplan Silk Company, defendants, a judgment was rendered against the Duplan Silk Company, and the said Duplan Silk Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said W. H. Spencer, trustee in bankruptcy of Bennett & Rothrock, *cited* and admonished him to be and appear at the session of the United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia, in said circuit, on the first Tuesday of March next.

Now the condition of the above obligation is such that if the said Duplan Silk Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, otherwise to be and remain in full force and virtue.

DUPLAN SILK COMPANY,
[SEAL.] By FRITZ ELBERS, *2d Vice-President.*

Sealed and delivered in the presence of
HENRY GIGERICH.

Attest: H. SCHNAKENBERG, *Secretary.*

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA,
By JOS. A. SINN, *2d Vice President.*

Attest: JAS. F. LYND, *Secretary.* [SEAL.]

Approved
BY THE COURT.

50 Endorsed: 6. U. S. C. C., E. D. of Pa. April sessions, 1901. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, *vs.* Duplan Silk Company. Bond sur writ of error. Wm. Jay Turner, def't's att'y. Filed January 24, 1902. Samuel Bell, clerk.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true andfaithful copy of the original pleas and proceedings in the case of W. H. Spencer, trustee, *vs.* Duplan Silk Company, No. 6, April sess., 1901, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 4th day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

SAMUEL BELL,
Clerk C. C.

[SEAL.]

51 And afterwards to-wit: on the seventh day of March, A. D. 1902, this cause being called for argument on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, Hon. George M. Dallas and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to-wit: on the seventh day of May, A. D. 1902 comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to-wit:

In the United States Circuit Court of Appeals for the Third Circuit.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennet & Rothrock, Defendant in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

GRAY, *J.:*

This was an action of trover, called under the Pennsylvania practice act of 1887 an action of trespass. It was brought by the defendant in error, as trustee in bankruptcy of the estate of Bennett & Rothrock, who were contractors and builders, against the Duplan Silk Company, charging the conversion of certain chattels, consist-

ing principally of lumber, iron work, nails, cement, brick and
52 sundry builder's utensils, of which a complete schedule is given in plaintiff's statement. There is little or no dispute about the essential facts in the case, as disclosed by the evidence. They are substantially as follows:

Bennett & Rothrock were builders, and, as such, entered into a written contract with the Duplan Silk Company, bearing date August 30th, 1899, to erect a silk mill for the defendant at Hazleton, Pa., providing all materials and performing the work mentioned in the specifications and shown in the drawings prepared by the architect. By this contract, it was provided that the sum to be paid by the owner to the contractor, for said work and materials, should be $76,000., payable in instalments as the work progressed to certain specified stages, the first instalment being $5,000.—and the remaining ones $10,000.—each. On the same day, a supplemental contract, according to the form of contract recommended for general use by the American Institute of Architects, was executed between the parties.

About December 15th, 1899, when the excavations and foundation walls and piers had been completed, and the brick walls partly built, work on the building was lagging. Although, according to the terms of the contract, only the first instalment of $5,000.— had become due, and it had been paid, Rothrock, one of the contractors, came to Emory J. Lipps, general manager of the Duplan Silk Company, and through whom, as its agent, the building contract was made, and asked whether certain moneys could not be advanced beyond what the contract called for. Lipps told him that, personally, he could not advance any money, but that if he presented his case to the board of directors of the Duplan Silk Company, they might be willing to do so. Accordingly, on December 16th, there
was a meeting in New York city, between Rothrock and those
53 representing the company, at which Rothrock stated that he was very short of money, and that unless he could get some from the company in advance, he could not pay for the material he had ordered, and the men would put him into bankruptcy. They had already made him a payment of $5,000.— and no other instalment was then due. The testimony of Lipps, as to the transaction between the parties, proceeds as follows:

"We had a meeting in New York city, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000., he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we consequently gave him the $15,000. That was on December 16th.

* * * * * * *

"Q. So the amount you had paid to the fifteenth of December was $20,000., although he was entitled to but $5,000.?

"A. Yes, sir; he was entitled to $5,000. when the excavations were done, and $10,000. when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5,000., and we advanced him $15,000. more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground."

After this money was advanced, work was continued for a short time, and by Christmas, or a day or two thereafter, it was practically abandoned. On the 13th of January, 1900, Bennett & Rothrock, on their own petition, were adjudicated bankrupts, and W. H. Spencer, defendant in error, was duly appointed and qualified as trustee of their estate. The chattels in controversy were scheduled among their assets, and there were numerous judgments against them, and executions issued thereon, when the petition was filed and the adjudication made.

On January 11th, 1900, certain letters from the Duplan Silk Company were sent to and received by Bennett & Rothrock, and, as they appear in the record, are as follows:

54 "SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

GENTLEMEN: We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on Monday, January 15, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

Yours truly, DUPLAN SILK COMPANY.
E. J. LIPPS, *General Manager*."

"SOUTH BETHLEHEM, *January* 11, 1900.

Duplan Silk Company, New York city, N. Y.

I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazleton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

E. J. LIPPS."

"SOUTH BETHLEHEM, *January* 11, 1900.

Messrs. Bennett & Rothrock, Williamsport, Pa.

DEAR SIRS: Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazleton.

Yours truly, DUPLAN SILK COMPANY."

It is admitted by counsel for plaintiff in error that these letters were intended to be pursuant to the 5th article of the supplemental contract, which provides as follows:

"Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after — days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor
55 he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

On January 15th, the plaintiff in error took exclusive possession of the building materials and tools, which constitute the property in controversy in this action, and which had been brought upon the premises by Bennett & Rothrock for the purpose of being incorporated in the mill, for the building of which they were contractors. The plaintiff in error then proceeded to use the materials in the erection of the building, upon which Bennett & Rothrock had defaulted. Thereafter, Spencer, defendant in error, as the trustee of the bankrupt estate, demanded from the plaintiff in error these materials. The demand was refused; whereupon, this action of trover for the recovery of the same was commenced by the said trustee.

Upon this evidence, the court below gave a binding instruction in favor of the plaintiff below, reserving the question of law, whether there was any evidence to go to the jury in support of the plaintiff's claim, and subsequently, on the motion of defendant below for judgment, *non obstante veredicto*, directed judgment to be entered for the plaintiff and against the defendant.

The question for the court here is, would the court, upon this

state of facts, have been justified in giving to the jury a binding instruction to find for the plaintiff?

The learned judge of the court below regarded the notices given by the owner to the contractor, on the 11th of January, and the subsequent taking possession, on the 15th of January, of the
56 materials brought on the premises by the contractor for the purposes of the building, as proceedings to enforce a forfeiture under article 5 of the supplemental contract, and as such to be strictly construed. Taking this view of the character of the provisions of said article 5, he decided that there had not been such a strict compliance by the owner with the requirements of said article 5, as to entitle it to claim a forfeiture, and that the unqualified and absolute property in the materials in question, passed to the trustee of the bankrupt contractor on the date of the adjudication of the bankruptcy. It was on this view, principally, that the judgment was entered which was equivalent to peremptory instructions to the jury to find for the plaintiff. On the undisputed facts, however, of this case, we think there was fundamental error in the position thus taken by the court below.

We do not think that the notice given by the owner, on the 11th of January, and the certificate of the architects on the same day, or the taking exclusive possession of the materials on the ground, on the 15th of the same month, are to be regarded as steps to enforce a forfeiture, nor that the right reserved to the owner under article 5 of the supplemental contract, is to be held as a stipulation to that effect.

The contract between the parties, contained in said article 5, is to be construed by its plain terms. So construed, it provides a particular mode, by which the owner of the premises may enforce the general security, evidently intended to be given him, by the materials brought on to the ground by the contractor, and appropriated by him to the purposes of the building under construction. In this, we discover no features of a technical forfeiture. The strictness with which it is sometimes said that a contract involving forfeiture
57 must be construed, is not applicable here. The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building, no suggestion of loss of property to the contractor, by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described, would tend to minimize the loss that would otherwise accrue to the contractor from his own default.

Looking, then, at article 5 to discover the intent of the parties as to this stipulation, we think it is clearly apparent to have been, that the materials brought by the contractor upon the premises, and appropriated to the building contracted for, should be considered as

so far delivered into the possession of the owner, as to make them a security for the advances made by the owner. A *quasi* or qualified right of property in these materials by the owner of the soil, and a possession not inconsistent with the builder's right and duty to incorporate them in the building, would thus result from their delivery by the contractor on the premises, and their appropriation to the construction of the building.

In this view of the case, we are not here concerned with the question, whether the plaintiff in error precisely complied with all the requirements of article 5, in taking steps to make effectual the security furnished by the materials brought by the contractor on the ground. The general contract as to this matter must be taken to mean something, and it would be of little avail to say that
58 the plaintiff in error can take the steps prescribed in article 5 to make this security available, if the materials themselves could be taken away, as claimed by defendant in error, by the execution of a creditor or the action of a trustee in bankruptcy. The effect of the whole contract between the parties, including article 5 of the supplemental contract, in whatever terms it may be described, was to affix to the materials brought upon the ground and appropriated to the building by the contractor, a charge or interest in favor of the plaintiff in error, consistent with the qualified ownership of the defendant in error, but commensurate with the requirement, that they should furnish security to the plaintiff in error for the performance of the contract and for advances made.

The special oral agreement of December 16th, 1899, as set forth in the testimony of Mr. Lipp, general manager for the plaintiff in error, which is not contradicted or disputed, may be taken as a specific appropriation of the materials at that time delivered on the premises of plaintiff in error, as security for the advances then made, freed from the requirements of notice and certification by the architect, contained in the 5th article of the supplemental agreement; and as making effective and available at once the inchoate lien or title of the plaintiff in error to said materials. In other words, by this oral agreement, the qualified possession of these materials by plaintiff in error, was made immediate and unqualified. The security originally intended by the parties, was perfected as to the advances then made.

Nor in this view of the mutual rights of the parties, can it be contended that this oral agreement of December 16th, 1899, was an unlawful preference, in fraud of the bankrupt law. It was not a new and independent contract, but a recognition of the old contract, and in furtherance and consummation of its intent. A mort-
59 gagor, who puts his mortgage into actual and unqualified possession of the chattels mortgaged, instead of compelling him to take the formal steps for a foreclosure, is acting in furtherance of the original contract, not making a new one, in the sense that would, in this case, transgress the inhibition of the bankrupt law as to preferential conveyances.

Unquestionably, the defendant in error could not have been

heard to challenge the legal and binding effect of this contract, as above described; but their counsel now contend that, even though it be good between the parties, their immediate representatives and volunteers, this contract cannot bind third parties without notice, and that *bona fide* judgment creditors could have levied upon and sequestered the materials here in question, unaffected by the contract, even though admitted to be binding between the parties. And if creditors could have so attached the property, free from any claim on the part of the plaintiff in error, then it is argued that, under the provisions of section 70 of the bankrupt law, which gives to the trustees any property which might have been levied upon and sold under judicial process against the bankrupt, the unqualified property in these materials vested in the trustee. The statute of Elizabeth, as in force in Pennsylvania, is invoked to declare illegal against creditors any conveyance, pledge or charge of property, unaccompanied by delivery or change of possession, and the court below, taking this view, relies upon section 67, clause (*a*), of the bankrupt law, which provides that "claims which for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under
60 judicial process against the bankrupt, either generally, or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But this assumption is not warranted. The goods delivered by the contractor upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties to the contract. They were in the possession of the owner of the free-hold as fully as they could be, consistently with the right of the contractor to incorporate them in the building. In this respect, this case differs from those cited by defendant in error, in which the materials furnished by the contractor, and in litigation between the parties, were in the exclusive possession of the contractor, never having been delivered upon the premises of the owner. Materials delivered as in this case, are notoriously to all the world, in the qualified possession and ownership of the owner of the freehold, and the creation of a lien or charge, or the making of a conveyance, would not require, or indeed be susceptible of, any further delivery or change of possession, in order to take the case out of the mischiefs of the statute of frauds.

To merely say that these materials could have been levied on by judgment creditors of the bankrupt, and thus bring them within the description contained in section 70 of the bankrupt law, of property that, upon the adjudication of bankruptcy passed to the trustee of the bankrupt, is begging the question. These materials would not, in our opinion, after their delivery on the premises by

the contractor, have been liable to such a seizure, for the reasons that we have already stated.

61 The situation of the parties, as the result of the contract between them, was such, that the contractor could have made no disposition of this property, inconsistent with his obligations under the contract, and he could have been prevented in equity, by injunction, from so doing; and equally so could a creditor have been prevented from asserting a right of seizure inconsistent with the interest of the plaintiff in error. In this respect, we think the case is quite within the *ratio decidendi* of *Hauselt v. Harrison*, 105 U. S. 401, 407. The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt, to personal property so situated, will be subject to all legal and equitable claims of others, which exist against the bankrupt, not in fraud of the bankrupt law or the rights of general creditors.

Hauselt *v.* Harrison (*supra*)
Cook *v.* Tullis, 18 Wall. 341.
Yeatman *v.* Sav. Inst. 95 U. S. 764.
Stewart *v.* Platt, 101 U. S. 739.
So. Branch Lumber Co. *v.* Ott, 102 U. S. 622.
Chattanooga Nat'l Bank *v.* Rome Iron Co. 102 F. R. 755.

The law of the contract, as we view it, supports the claim of plaintiff in error, that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an advance of $15,000, upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor, to enforce the original contractual right and, to apply the materials to the use to which they had been specifically

62 appropriated by the contractor, in delivering them on to the premises of the owner for use in fulfilling the contract.

We disagree, also, with the position taken by the learned judge of the court below, in regard to the effect of the oral agreement of December 16th, when he says:—"Even assuming, however, that a contract of pledge was actually made, it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore if under such circumstances any lien could be said to exist, it would be a secret lien, and, like the privileges reserved under the 5th article, would also be stricken down by the Pennsylvania law in favor of other creditors."

What we have already said, as to the effect of the delivery by the contractor of the materials upon the premises of the silk company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general contract, and especially in the 5th article of the supplemental agreement, is applicable to the proposition of the learned judge, just quoted. There is no intimation in the testimony that, if this oral agreement was a distinct and independent pledge, it was not, to use the language of

section 67 (*d*) of the bankrupt act, "given or accepted in good faith, and not in contemplation of or in fraud upon this act and for a present consideration." The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was no sufficient delivery or change of possession, to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsylvania in that behalf, in favor of attaching creditors, and therefore of the trustee in bankruptcy. The intention to pledge being clear, and the consideration being substantial and adequate, what
63 other act was necessary, to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania, as founded on the statute of Elizabeth? The materials were already on the land and premises of the company, for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back, or by removing them to other land of the silk company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the statute of frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case, no assertion of a right in a creditor to attach is suggested.

On the whole case, therefore, we think the learned judge of the court below erred in not granting defendant's motion for judgment, notwithstanding the verdict. The judgment below is therefore reversed, with directions to enter one in favor of the defendant.

(Endorsed:) Duplan Silk Company, plaintiff in error, *v.* W. H. Spencer, trustee in bankruptcy etc., Opinion of the court by Gray, circuit judge. Filed May 7, 1902.

64 In the United States Circuit Court of Appeals for the Third Circuit.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of New York, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter judgment in favor of the defendant.

GEO. M. DALLAS, *Cir. Judge.*

Philadelphia, May 9, 1902.

(Endorsed:) No. 10 March term 1902, Order reversing judgment of lower court, with directions to enter judgment for defendant. Entered and filed May 9, 1902.

65 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, Plaintiff in Error,
vs.
W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennet- and Rothrock, Defendant in Error. } No. 10.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

And now to-wit: this sixth day of June A. D. 1902, it is ordered that mandate issue to the said circuit court of the United States, for the eastern district of Pennsylvania in accordance with the opinion and judgment of this court in said cause.

GEO. M. DALLAS, *Cir. Judge.*

(Endorsed:) No. 10 March term 1902, Order for mandate to issue. Entered and filed June 6. 1902.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

[Seal United States Circuit Court of Appeals, Third Circuit.]

Whereas, lately in the circuit court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between Duplan Silk Company a corporation organized and existing under the laws of New York, plaintiff in error, against W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, defendant in error, wherein the verdict of the jury and judgment of the said circuit court entered in said cause is in the following words, viz:

"And the jurors aforesaid upon there oaths and affirmations respectively do say that they find for plaintiff and assess the damages at twelve thousand one hundred and eighty-three 00/100 dollars.

1902 January 18.—Præcipe for judgment filed. Judgment accordingly.

67 as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

68 And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby reversed with costs, and that the said defendant, The Duplan Silk Company, recover against the said plaintiff, W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett and Rothrock, one hundred and four dollars and twenty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be remanded to the said circuit court with directions to enter judgment in favor of the defendant.

Philadelphia, May 9. 1902.

69 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of June, in the year of our Lord one thousand nine hundred and two.

Costs of Duplan Silk Co.

Clerk	$19.25
Printing record	65.00
Attorney	20.00
	$104.25

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals,
Third Circuit.

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 10, March term, 1902. Duplan Silk Co. plaintiff in error, *vs.* W. H. Spencer trustee in bankruptcy etc. Mandate.

70 United States Circuit Court of Appeals, Third Circuit, March Term, 1902.

Costs of Duplan Silk Company in No. 10.

1902, March term.—Docketing cause and filing record, $5.00; appearance, .50; filing precipe and receipt, .50; filing papers, $1.00; filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $13.00; cost of printing record, $52.00; attorney's docket fee $20.00 costs and copy, .40..... 104 25

Fee Book 3, page 135.

Test:

WM. H. MERRICK,
Clerk Circuit Court of Appeals, 3d Circuit.

71 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under *under* the Laws of the State of New York, Plaintiff in Error,

vs.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett & Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error. } No. 10.

In error to the United States circuit court in and for the eastern district of Pennsylvania.

Assignments of Error.

Comes now, the said defendant in error, by his attorney, T. M. B. Hicks, and files the following assignments of error upon which he will rely:

1st. That the United States circuit court of appeals for the third circuit erred in the above entitled cause in entering the judgment of May 7, 1902, reversing the judgment herein of the circuit court of the United States in and for the eastern district of Pennsylvania.

2nd. That the United States circuit court of appeals for the third circuit erred in the above entitled cause in not affirming the judgment of the circuit court of the United States in and for the eastern district of Pennsylvania to which the writ of error in this cause was taken.

T. M. B. HICKS,
Attorney for W. H. Spencer, Trustee, &c., Defendant in Error.

72 & 73 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1902.

DUPLAN SILK COMPANY, a Corporation Organized and Existing under the Laws of the State of New York, Plaintiff in Error,

vs.

W. H. SPENCER, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners as Bennett & Rothrock, Defendant in Error.

No. 10.

In error to the United States circuit court in and for the eastern district of Pennsylvania.

W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, bankrupts, feeling himself aggrieved by the judgment of the United States circuit court of appeals for the third circuit entered in this cause May 7, 1902, reversing the judgment of the United States circuit court in and for the eastern district of Pennsylvania, comes now by T. M. B. Hicks, his attorney, and, showing that the said cause is not one in which the judgment of the United States circuit court of appeals is made final and that the amount in controversy in said cause exceeds one thousand dollars besides costs, petitions for an order allowing said defendant in error to prosecute a writ of error to the honorable the Supreme Court of the United States, and *and* according to the laws of the United States in that behalf made and provided, for the purpose of reversing the said judgment of the United States circuit court of appeals for the third circuit, and that all further proceedings be suspended and stayed in said cause until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray, etc.

Dated this 10th day of June, A. D. 1902.

T. M. B. HICKS,

Attorney for W. H. Spencer, Trustee in Bankruptcy of the Estate of James V. Bennett and Samuel W. Rothrock, Partners, &c., Bankrupts.

June 10/02.

Allowed:

GEORGE SHIRAS, JR.,
Associate Justice of the S. Ct.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Duplan Silk Company, plaintiff in error, and W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

75 UNITED STATES OF AMERICA, *ss:*

To Duplan Silk Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, is plaintiff in error and you are defendant in error, to show cause, if

any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand nine hundred and two.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

76 On this eighteenth day of June, in the year of our Lord one thousand nine hundred and two, personally appeared Russell T. Boswell, before me, the subscriber, a notary public for the State of Pennsylvania residing in the city of Philadelphia under commission expiring Jan'y 5, 1905 and makes oath that he delivered a true copy of the within citation to William J. Turner, attorney of record for the Duplan Silk Company, at his office, 929 Chestnut street, Philadelphia, Pa., on June 18th, 1902, at 2 o'clock p. m.

RUSSELL T. BOSWELL.

Sworn to and subscribed the 18" day of June, A. D. 1902.

[Seal of Chas. Cobb Van Riper, Notary Public, Philada., Pa.]

CHAS. COBB VAN RIPER,
Notary Public.

77 UNITED STATES OF AMERICA, ss:

To Duplan Silk Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit wherein W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand nine hundred and two.

(Signed) GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

78 We hereby accept service of the within citation, and direct the clerk of the Supreme Court of the United States to enter

our appearance for The Duplan Silk Company, the defendant in error therein named.

RICHARD C. DALE,
752 *Bullitt Bldg., Philadelphia, Pa.*
WM. JAY TURNER,
929 *Chestnut St., Philada., Pa.*

79 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to seventy-six inclusive to contain a full, true, complete and faithful copy of the original transcript of record in the case of W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett & Rothrock, plaintiff in error, against Du*l*pan Silk Company, a corporation organized and existing under the laws of the State of New York, defendant in error on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of July, in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-seventh.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 18603. U. S. C. C. of appeals, third circuit. Term No. 83. W. H. Spencer, trustee in bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, partners as Bennett and Rothrock, plaintiff in error, *vs.* Duplan Silk Company. Filed July 12th, 1902.